

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0088-PR
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JONAH PARKER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR2006-084

Honorable Monica Stauffer, Judge

REVIEW GRANTED; RELIEF DENIED

Derek D. Rapier, Greenlee County Attorney
By Michael McCarthy

Clifton
Attorneys for Respondent

Jonah Parker

Winslow
In Propria Persona

ESPINOSA, Presiding Judge.

¶1 In this petition for review, Jonah Parker challenges the trial court’s denial of the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the trial court’s ruling absent a manifest abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Although we grant review, we deny relief.

¶2 After having been charged with five methamphetamine-related felony offenses, Parker agreed to plead guilty to a single count of attempted transportation of a dangerous drug for sale, a class three felony. *See* A.R.S. §§ 13-1001(C)(2), 13-3407(B)(7). At his change-of-plea hearing, he admitted having driven his nephew to Globe, Arizona “for the purposes of picking up dope,” which he learned at some point during the trip was methamphetamine. He “agreed . . . to transport [the nephew] to Greenlee County with the methamphetamine.” On the way, however, the two were stopped by authorities and 39.49 grams of methamphetamine was found in the vehicle. The trial court accepted Parker’s guilty plea.

¶3 At sentencing, the trial court stated it had considered the following mitigating and aggravating circumstances in determining the appropriate punishment for Parker’s offense. The court found Parker’s employment history and “the extensive support [Parker received] from [his] work site” were mitigating circumstances. In aggravation, the court found that Parker had committed the offense for pecuniary gain and with an accomplice and that Parker’s behavior had endangered the community. The court also considered Parker’s

criminal history in aggravation. It imposed an enhanced, presumptive term of 3.5 years' imprisonment.

¶4 In his petition for post-conviction relief, Parker asserted the trial court had “considered improper aggravating factors and failed to consider appropriate mitigating factors in reaching the sentenc[e].” He argued, among other things, the court had improperly considered pecuniary gain as an aggravating circumstance because it was an element of the offense. After a hearing, the court denied Parker’s request for post-conviction relief and dismissed his petition, concluding it had appropriately considered and weighed the aggravating circumstances in the case.

¶5 In his petition for review, Parker again asserts that the receipt or expectation of pecuniary gain was an element of his offense; thus, he contends, the trial court improperly considered pecuniary gain as an aggravating factor and abused its discretion in denying post-conviction relief. Although he received a presumptive sentence, he contends the court used an improper “sentencing calculus” in violation of due process and constitutional protections against double jeopardy.

¶6 Pecuniary gain is not an element of attempt to transport a dangerous drug for sale. Parker argues the receipt or expectation of pecuniary gain is inherent in the term “sale” as used in § 13-3407(A)(7). But “sale” is statutorily defined as “an exchange for anything of value or advantage, present or prospective,” not necessarily *pecuniary* value. A.R.S. § 13-3401(32). Contrary to Parker’s assertion, the plain meaning of the word “value” is not

limited to a monetary amount. *See, e.g., Webster's II New College Dictionary* 1219 (1995) (defining “value” as “[a]n amount regarded as a suitable equivalent for something else” or “[w]orth in usefulness or importance to the possessor”); *see also State v. Hasson*, 217 Ariz. 559, ¶ 11, 177 P.3d 301, 304 (App. 2008) (“We give clear and unambiguous statutory language its plain and ordinary meaning unless absurd consequences would result.”). The pecuniary gain aggravating circumstance, however, requires proof that “[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.” A.R.S. § 13-701(D)(6).¹ It is thus more restrictive than the element of “sale” in the transport or attempted transport of a dangerous drug for sale and was not an element of Parker’s offense. Moreover, pecuniary gain is a specifically enumerated aggravating circumstance that, when present, a trial court must consider in determining an appropriate sentence—even if the circumstance is also an element of the offense—although the court need not impose an aggravated sentence. *Id.*; *see also State v. Bly*, 127 Ariz. 370, 371-73, 621 P.2d 279, 280-82 (1980) (legislature constitutionally may require consideration of element of offense more than once in exercising its authority to prescribe punishment for single crime); *see also State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986) (applying *Bly*).

¹Significant portions of the Arizona Criminal Sentencing Code have been renumbered, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes relevant to this case, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense.

¶7 Accordingly, we conclude the trial court did not abuse its discretion in determining it had properly considered the aggravating circumstance of pecuniary gain in imposing sentence and dismissing Parker’s petition for post-conviction relief. Although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge